(2)

No. 00-438

In the Supreme Court of the United States

JAMES LYSAGHT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the RICO conspiracy provision, 18 U.S.C. 1962(d), requires proof that a defendant agreed to participate personally in the operation or management of the enterprise.

2. Whether the government forfeited its right under Federal Rules of Appellate Procedure 10(e) to seek to correct an error in the trial transcript by failing to assert the right in a timely fashion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-93a) is reported at 208 F.3d 72.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2000. A petition for rehearing was denied on June 21, 2000. Pet. App. 94a-95a. The petition for a writ of certiorari was filed on September 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a trial in the United States District Court for the Southern District of New York, each petitioner was convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Rackateer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. 1962(d). In addition, petitioner Hartman was convicted of wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Hartman was sentenced to 80 months' imprisonment, and petitioners Lysaght and Kramer were sentenced to 27 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-93a.

1. Petitioner Hartman was a labor negotiator for the New York City Transit Police Benevolent Association (TPBA). Pet. App. 2a. Petitioners Lysaght and Kramer were partners in a law firm. *Ibid.* Between 1990 and 1994, petitioners paid TPBA officers more than $400,000 in exchange for the TPBA's award to Lysaght's and Kramer's law firm of more than $2 million in legal and consulting fees. *Id.* at 8a. Hartman also paid bribes to TPBA officers in exchange for being named the "broker of record" for whole life insurance purchases by TPBA members. *Id.* at 8a-9a. In addition, Hartman and co-defendant Reale, the former president of the TPBA, used TPBA funds to pay for Reale's campaign for Public Advocate of the City of New York. *Id.* at 9a. They also engaged in a scheme, using TPBA funds, to fraudulently obtain campaign matching funds from the New York City Campaign Finance Board. *Ibid.*

2. On appeal, petitioners contended that the district court gave an erroneous aiding and abetting instruction

to the jury. Pet. App. 9a-13a. The challenged instruction "misquote[d] the federal aiding and abetting statute and in other ways compounded the misquotation by, for example, including language about aiding and abetting a conspiracy." *Id.* at 23a. Although the prosecutors who tried the case did not recall that the district court's aiding and abetting charge included the challenged language, they could not say with "absolute certainty" that the court had not delivered the charge as reflected in the official transcript. *Id.* at 26a. For that reason, and because the government was under "significant time pressure to file a factually complex and lengthy brief," the government decided to respond to petitioners' contention on the merits. *Ibid.*

Three days after the government filed its brief, a chance conversation between one of the lead prosecutors in the case and the trial judge's law clerk at the time of the trial prompted the government to inquire further into the question whether the challenged instruction had actually been given to the jury. Pet. App. 26a-27a. The court reporter who transcribed the jury instructions told the government that he believed that the language challenged by petitioners was not read to the jury, and documents provided by the court reporter supported his belief. *Id.* at 27a. Based on that and other information, the government concluded that the challenged instruction had not been given and that someone in the judge's chambers had altered the court reporter's transcript to conform to what that person mistakenly believed was the charge actually read to the jury. *Id.* at 3a, 27a. The government therefore filed a motion in the court of appeals, pursuant to Federal Rules of Appellate Procedure 10(e)(2), to correct the portion of the trial transcript containing the challenged

instruction to reflect the instruction that was actually given. Pet. App. 27a-28a.

The court of appeals granted the government's motion, Pet. App. 48a, finding that "[a]ll the known facts, including most importantly the contemporaneous writings of the district judge and the Law Clerk, firmly and fully support the government's contention that the district court did not give the instruction" challenged by petitioners, *id.* at 39a. The court further determined that the challenged instruction appeared in the official transcript, because the district court had mistakenly made changes to the reporter's transcript and failed to notify the parties that it had made those changes. *Id.* at 49a n.11. The court then held that, on the amended record, petitioner's challenge to the aiding and abetting instruction was "meritless." *Id.* at 48a.

The court of appeals rejected the contention that the government had waived its right to have the transcript corrected by failing to raise the issue earlier. Pet. App. 49a n.11. The court held that Federal Rules of Appellate Procedure 10(e) does not limit the time within which a motion to amend the transcript can be filed. Pet. App. 49a n.11. The court further held that "principles of waiver are not triggered where courts alter transcripts until a party has reasonable notice of such alteration." *Ibid.* Because the district court's actions had prevented the government from learning about the alteration in the transcript, the court determined, the government did not obtain such notice until the chance meeting between one of the prosecutors and the district court's law clerk alerted the government to that possibility. *Ibid.* Once the government obtained such notice, the court concluded, "[i]t acted expeditiously thereafter." *Ibid.*

The court of appeals also rejected petitioners' contention that their RICO conspiracy convictions should be reversed because the evidence did not show that they participated in the operation or management of the enterprise. Pet. App. 51a-55a. The court of appeals held that, while the government must show that a defendant played some part in directing the enterprise's affairs in order to establish a substantive RICO offense, 18 U.S.C. 1962(c), such a showing is not required in order to convict a defendant of a RICO conspiracy. Pet. App. 52a. Rather, once the government has established that a RICO conspiracy exists, it need only show that the defendant knew the "general nature of the conspiracy and that the conspiracy extend[ed] beyond [his] individual role[]." *Id.* at 53a. The court concluded that the evidence at trial was sufficient to establish that petitioners had the requisite knowledge. *Id.* at 55a.

Judge Oakes dissented. Pet. App. 88a-93a. He concluded that the government's challenge to the record was raised too late, and without an adequate explanation for the delay. *Id.* at 88a. Accordingly, Judge Oakes would have treated the aiding and abetting instruction contained in the official transcript as the record on appeal, denied the government's motion to correct the transcript, and reversed petitioners' RICO conspiracy convictions because of the erroneous aiding and abetting instruction. *Id.* at 93a.

ARGUMENT

1. Petitioners contend (Pet. 14-19) that the RICO conspiracy provision, 18 U.S.C. 1962(d), requires proof that they agreed to personally participate in the operation or management of a criminal enterprise. In making that argument, petitioners rely on *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993), which holds that "one

is not liable under [the substantive RICO provision, 18 U.S.C. 1962(c)] unless one has participated in the operation or management of the enterprise itself."

This Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), disposes of petitioners' contention. In that case, Salinas argued that a defendant cannot be liable for a RICO conspiracy offense "unless he himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under § 1962(c)." *Id.* at 61. The Court rejected that contention, holding that proof that Salinas's co-conspirator committed two predicate acts and that Salinas knew about the acts and agreed to facilitate them was sufficient to establish that Salinas violated the RICO conspiracy provision. *Id.* at 65-66. In reaching that conclusion, the Court relied on "well-established principles" of conspiracy law. *Id.* at 63. In particular, the Court explained that, under general conspiracy law principles, "[i]f conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators." *Id.* at 64. The Court added that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65.

The well-established conspiracy law principles on which the Court relied in *Salinas* are equally applicable to RICO's "operation or management" requirement. In order to establish that petitioners violated the RICO conspiracy provision, it is not necessary to show that petitioners agreed to operate or manage a criminal enterprise themselves. Instead, it is sufficient to show that petitioners agreed to facilitate a co-conspirator's

operation or management of the enterprise. Consistent with that analysis, four courts of appeals have held that a defendant may be convicted of a RICO conspiracy without proof that he agreed to operate or manage the criminal enterprise himself. *United States* v. *Viola*, 35 F.3d 37, 42-43 (2d Cir. 1994), cert. denied, 513 U.S. 1198 (1995); *United States* v. *Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998), cert. denied, 526 U.S. 1031 (1999); *United States* v. *Quintanilla*, 2 F.3d 1469, 1484-1485 (7th Cir. 1993); *United States* v. *Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995), cert. denied, 517 U.S. 1111 (1996).

As petitioners note (Pet. 15), the Third and Ninth Circuits have held that the RICO conspiracy provision requires proof that the defendant agreed to personally participate in the operation or management of the enterprise. *United States* v. *Antar*, 53 F.3d 568, 581 (3d Cir. 1995); *Neibel* v. *Trans World Ins. Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997). *Antar* and *Neibel*, however, were both decided before this Court's decision in *Salinas*, and the Third and Ninth Circuits have not yet evaluated the impact of *Salinas* on those decisions. The Third Circuit granted rehearing en banc in *Klein* v. *Boyd*, No. 97-1143, 1998 WL 55245 (Mar. 9, 1998), to reconsider *Antar* in light of *Salinas*, but the case was settled and the suit was dismissed before the en banc court issued a decision. Because *Salinas* makes clear that the RICO conspiracy provision does not require proof that the defendant agreed to personally operate or manage the criminal enterprise, and because there is no post-*Salinas* conflict on that issue, this Court's review of the issue is not warranted.

2. Petitioners also contend (Pet. 20-26) that their RICO conspiracy convictions should be reversed because the official transcript released by the district court shows that the district court gave an erroneous

aiding and abetting instruction. Petitioners' do not challenge the court of appeals' determination that the challenged instruction was not actually given. Rather, they contend that the court of appeals erred in granting the government's motion to correct the erroneous version of the instruction because the motion was made out of time. That fact-bound contention is without merit and does not warrant review.

Motions to correct the record on appeal are governed by Federal Rules of Appellate Procedure 10(e), which provides in pertinent part that:

> (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.
>
> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and forwarded:
>
> * * * * *
>
> (B) by the district court before or after the record has been forwarded; or
>
> (C) by the court of appeals.

As the court of appeals concluded, Rule 10 does not contain any time limitation for the filing of a motion to correct the record on appeal. The question whether to entertain such a motion is therefore left to a court's discretion.

In the unusual circumstances presented here, the court of appeals did not abuse its discretion in enter-

taining the government's motion. First, the government did not unreasonably delay in filing its motion to correct the record. As the court of appeals found, "[b]ecause the district court did not notify the parties that it had made substantial alterations to the transcript produced by the court reporter after trial[,] * * * the government had little reason and no grounds to challenge the [official transcript] as not being the court reporter's version of what was said." Pet. App. 49a n. 11. While government attorneys had vague suspicions before they filed their brief that the record was inaccurate, "[i]t was only when [one of those attorneys] and her husband understood the Law Clerk to say that the charge did not correspond to the 'script' retained in chambers that the government was for the first time on notice that someone might have altered the transcript." *Ibid.* At that point, the government acted "expeditiously" to investigate the matter and to seek judicial relief. *Ibid.*

Moreover, petitioners were convicted after a "difficult and complex" three-and-one-half month trial, Pet. App. 3a, and "[a]ll the known facts * * * firmly and fully support" the conclusion "that the district court did not give the instruction" challenged by petitioners, *id.* at 39a. To have reversed petitioners' convictions in those circumstances based on a defective charge that was not given would have resulted in "manifest injustice." See *United States* v. *Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994).

Petitioners contend (Pet. 20) that the court of appeals' failure to hold that the government procedurally defaulted on its claim conflicts with *United States* v. *Olano*, 507 U.S. 725 (1993). *Olano*, however, did not concern a motion to correct the record under Rule 10(e), Federal Rules of Appellate Procedure. In

any event, nothing in *Olano* suggests that, in the unusual circumstances presented here, the court of appeals abused its discretion in correcting the record to reflect the charge that was actually given rather than reversing petitioners' convictions based on a charge that was not given.

Petitioners' remaining contentions likewise do not warrant review. Petitioners contend (Pet. 23, 25) that Federal Rules of Appellate Procedure 28 deprived the court of appeals of any discretion to correct the record once the government filed its opening brief. Rule 28, however, simply requires appellants and appellees to cite in their briefs to the parts of the record on which they rely. Rule 28 does not address the issue of correcting an inaccurate trial record, and no time limitation can be read into Rule 10(e) based on Rule 28's requirement that briefs cite to the record. See *United States* v. *Mori*, 444 F.2d 240, 246 (5th Cir.) (upholding district court's granting of Rule 10(e) motion made after the filing of defendant's brief on appeal), cert. denied, 404 U.S. 913 (1971).

Petitioners also assert (Pet. 25) that Rule 10(e) requires that a motion to correct the record must be directed to the district court rather than to the court of appeals. But the text of Rule 10(e) specifies that the record may be corrected "by the court of appeals." Fed. R. App. P. 10(e)(2)(C). Moreover, as the court of appeals explained (Pet. App. 38a), because the district court had already expressed its view on the issue in a submission to the court of appeals, there was no need to require the government to proceed in the district court in the first instance.

Petitioners do not assert that the court of appeals' correction of the record in this case conflicts with the decision of any other court of appeals. Nor does the

court of appeals' decision raise any issue of recurring importance. As the court of appeals repeatedly stressed, the circumstances of the case are "unique" and "unusual." Pet. App. 3a, 18a, 38a. The delay in the government's discovery of the inaccuracy of the official transcript was directly attributable to the district court's extraordinary practice of altering transcripts *in camera* and concealing the alterations from the parties. *Id.* at 49a-50a. The court of appeals' response to that unusual and rarely occurring circumstance does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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